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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FIRST ADVANTAGE INSURANCE, INC., *et al.*,

Petitioners,

v.

DOUGLAS D. GREEN, COMMISSIONER OF INSURANCE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal for the First Circuit, State of Louisiana

BRIEF OF THE *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, *ET AL.*, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a federal banking statute that grants authority to national banks operating in towns having a population not exceeding 5,000 inhabitants to sell all types of insurance, as an agent (12 U.S.C. § 92 (1994)), is preempted by a state banking statute prohibiting state-chartered banks from carrying on such activities.

2. Whether a state banking law prohibiting all banks from selling insurance is a law enacted for the purpose of regulating the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988).

3. Whether 12 U.S.C. Section 92 "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

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BRIEF OF THE *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, *ET AL.*, IN SUPPORT OF PETITIONERS

The American Bankers Association, *et al.*, hereby respectfully submit this brief as *amici curiae* in support of the Petitioners in accordance with the provisions of S. Ct. R. 37.2. All parties have consented to this filing, and their written consents are filed with this brief.

INTERESTS OF THE *AMICI CURIAE*

The *amici* are two national banking trade associations and the statewide banking trade association of Louisiana. The *American Bankers Association* (ABA) is the principal national trade association of the commercial banking industry in the United States, representing banks located in each of the fifty states and the District of Columbia, banks of all sizes, and both national and state-chartered banks. Assets of ABA member banks comprise over ninety percent of the domestic assets of all commercial banks in the country.

The *Association of Banks in Insurance, Inc.* (ABI) is a national trade association of financial institutions and insurance companies with an interest in insurance activities. ABI was organized to protect and further bank insurance powers. Its members include insurance companies, banks, and bank holding companies owning national and state banks, and other companies engaged in the insurance business.

The *Louisiana Bankers Association* (LBA) is the principal trade association for the commercial banking industry in Louisiana. The LBA is comprised of some ninety-fix percent of federally-chartered and state-chartered commercial banks in Louisiana, many of which are located in towns having a population not exceeding 5,000. It also has savings and loan associations as members. Since many LBA members are located in

"small towns," this case presents issues of direct and immediate importance to the LBA and its many members, who should be eligible to sell insurance as agents from small towns. It has many bank members who will be directly affected by the outcome of this litigation.

Section 92 of the National Bank Act, 12 U.S.C. Section 92 (1994), authorizes national banks in small towns (*i.e.*, towns having a population not exceeding 5,000) to engage in general insurance agency activities, the existence and breadth of which authority was upheld in *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173 (1993) and *Independent Ins. Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). The decision of the Louisiana Court of Appeal for the First Circuit would allow a state to interfere with this authority via a state statute that clearly conflicts with Section 92. Approximately twenty other states have anti-competitive statutes similar in effect (if not in exact form[1]) to Louisiana's, which attempt to single out banks

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[1] The Louisiana statutes involved in this litigation differ from the "anti-affiliation" statutes upheld in other cases. The Louisiana statutes define the powers of state-chartered banks and the State Banking Commissioner and proscribe certain insurance activities by state-chartered banks. Although the statutes by their terms and placement affect only state-chartered entities, they, when applied by the Louisiana Department of Insurance and Louisiana courts to national banks, are being applied as a *restriction on federally-authorized powers*. In comparison, the statutes at issue in *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir.), *petition*

by barring them from insurance sales activities. The *amici* have members in these states, who would be adversely affected if the Louisiana state court decision is not overturned, because it would set a precedent for these states to use to deny national banks the ability to exercise powers unequivocally granted by Congress to sell insurance in small towns.

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for cert. filed, 63 U.S.L.W. 2478 (U.S. May 8, 1995) (No. 94-1837) and in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), are so-called "anti-affiliation" statutes. Anti-affiliation statutes prevent banks from engaging in certain insurance agency activities, but they do so by *prohibiting affiliations between insurance agencies and banks*. Many states construe these anti-affiliation statutes to apply to national banks. Whether the statute in question involves an attempt to restrict a bank's inherent powers -- as is the case here -- or to prohibit affiliations between banks and insurance agencies -- as in the *Owensboro* and *Barnett* cases -- the effect is the same: The state statute is used to prevent national banks from exercising powers authorized under federal law. Most importantly, under either approach, courts deciding against bank interests have relied on the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988), to alter what otherwise would be preemption by federal law of the state statute as it applies to national banks.

Furthermore, by 1995 La. Acts 681, the Louisiana Legislature amended the Louisiana statutes to expressly confer upon state banks the power to sell insurance as agent, to the same extent as that power is enjoyed by federally-chartered banks. The Louisiana court held national banks' powers under Section 92 are restricted by state law; but state law now defers to federal law under Act 681.

This is the second of what *amici* expect to be three cases the Court will be asked to consider that involve this important federal-state issue within the context of the McCarran-Ferguson Act. *See Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir.), *petition for cert. filed*, 63 U.S.L.W. 2478 (U.S. May 8, 1995) (No. 94-1837); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994).

REASONS FOR GRANTING THE WRIT

Federal law, in the form of the National Bank Act, 12 U.S.C. § 21 *et seq.* (1994), is the paramount authority for the establishment and operation of national banking associations; by itself, it constitutes a complete system for the formation and governance of national banks. *First Nat'l Bank in Plant City, Fla. v. Dickinson*, 369 U.S. 122, 131 (1969); *Dietrick v. Greaney*, 309 U.S. 190, 193 (1940). National banks are also subject to state laws, but only so long as those laws do not conflict with or frustrate the purpose of the laws of the United States. *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985-86 (3rd Cir. 1980); *Starr v. O'Connor*, 118 F.2d 548, 555 (6th Cir. 1941). State laws which frustrate, burden or impede a federal purpose are nullities. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). The decision of the Louisiana Court of Appeal for the First Circuit thwarts the preeminence of federal law in effecting national bank powers and frustrates, burdens, and impedes the will of Congress. The state court misinterpreted, misconstrued

and misapplied the two tests of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988), that are used to determine if a state law survives a conflicting federal law. In so doing, it sanctioned the use of a state banking statute governing only state-chartered banks to block a national bank's exercise of a duly authorized power to engage in general insurance agency activities -- a power whose vitality pursuant to Section 92 of the National Bank Act, 12 U.S.C. § 92 (1994), is unquestioned.[2]

I. THE CONFLICT BETWEEN THE LOUISIANA COURT OF APPEAL FOR THE FIRST CIRCUIT AND A UNITED STATES CIRCUIT COURT OF APPEALS

The Louisiana Court of Appeal decision[3] directly conflicts with a recent case from the United States Court of Appeals for the Sixth Circuit. *See Owensboro Nat'l*

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[2] The state court briefly addressed Petitioners' claim that the Louisiana statutes violated the Equal Protection Clauses of both the federal and Louisiana constitutions. With very little analysis, the state court denied this claim, notwithstanding that under Louisiana law all financial institutions similarly situated to banks, such as state and federal savings and loan associations and state and federal credit unions, can act as insurance agents in Louisiana and that such authority is denied to banks alone. *See* Petition at 34a-35a.

[3] The Louisiana Supreme Court denied the Petition for Writ of Certiorari and/or Review, *see First Advantage Ins., Inc. v. Green*, 654 So. 2d 331 (La. 1995) (reprinted in Petition at 36a), thus rendering the Louisiana Court of Appeal for the First Circuit the state court of last resort.

Bank v. Stephens, 44 F.3d 388 (6th Cir. 1994).[4] The Louisiana state court adopted the rationale of the Eleventh Circuit in *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir.), *petition for cert. filed*, 63 U.S.L.W. 2478 (U.S. May 8, 1995) (No. 94-1837). Absent this Court's involvement, the differing results reached in these cases will allow jurisdictions where the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988), has been interpreted as permitting a state statute restricting bank insurance activities, to preempt a federal statute, thereby preventing national banks in small towns from exercising powers Congress intended them to exercise without constraint. Unlike the Sixth Circuit in the *Owensboro* case, the Louisiana state court clearly misapplied precedent of this Court in upholding the Louisiana statutes via reliance upon the McCarran-Ferguson Act. Your *amici* concur in the argument presented in the Petition, but want to bring to this Court's attention further discussion of the relevant precedent and impact on the business of banking if this decision is left standing.

The state court's holding that the Louisiana statutes in question "regulat[e] the business of insurance" is contrary to the Sixth Circuit's correct application to a similar state statutory regime of *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993) and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). In *Fabe*, this Court addressed whether an Ohio statute conferring only fifth priority upon claims of the United States in proceedings to liquidate an insolvent insurance company

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[4] Your *amici* expect a petition for certiorari to be filed with the Court in *Owensboro Nat'l Bank v. Stephens*.

was a law enacted "for the purpose of regulating the business of insurance." The statute attempted to protect a policyholder trying to enforce performance of an insurance contract with an insolvent insurance company; an insurer-policyholder relationship already existed. In its determination of whether the state statute was a law enacted "for the purpose of regulating the business of insurance," the Court focused solely on whether the state statute in any manner attempted to affect the contractual relationship between an insurer and a policyholder. In discussing the Court's prior holding in *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969), to determine what activities constitute the "business of insurance," this Court noted that "[*National Sec.*] emphasized that the focus of McCarran-Ferguson is upon the *relationship* between the insurance company and its policyholders." *Fabe*, 113 S. Ct. at 2208 (emphasis added). *National Sec.*, accordingly, declared that:

> "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the core of the 'business of insurance.' Undoubtedly, other activities of *insurance companies* relate so closely to their status as *reliable insurers* that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was -- it was on the *relationship* between the insurance company and the policyholder."

Id. (emphasis added) (citation omitted).

The Louisiana Court of Appeal for the First Circuit grievously misapplied *Fabe* by upholding a statutory scheme that does not attempt to regulate a relationship between a policyholder and an insurer. The error in the state court's decision is that LA. REV. STAT. ANN. Sections 6:121(B)(2), 6:242(A)(6), and 6:513(3) (West 1954 & Supp. 1995) do not focus on the *relationship* between the insurance company and the policyholder; rather, they focus exclusively on the form in which the *agent* conducts its business. In doing so, the state court fell into the trap of equating activities by a particular type of insurance agency to those activities influencing the relationship between a policyholder and an insurer as anticipated by the McCarran-Ferguson Act. The state court reasoned:

> These state statutory provisions were enacted by the state legislature to protect and regulate the relationship between insurer and insured at a very basic level by barring a certain industry, namely the banking industry, from selling all types of insurance....
>
> Clearly, the relationship between insurer and insured, the authority of an individual or entity to sell a certain type of insurance policy, and other activities of individuals or entities acting in the capacity of insurance companies relate so closely to their *status as reliable insurers* that they must be placed in the same class as the types of activities that are at the core of the "business of insurance."

Petition at 22a-23a.

The most significant flaw in this reasoning of the state court is its grouping together of insurance underwriters with insurance agencies as "insurers" in determining whether the referenced statutes regulate the relationship between an insurer and a policyholder. Such a grouping ignores the most basic difference between an underwriter and an agency: only an underwriter (as opposed to an agent) assumes a risk from having issued an insurance policy. Accordingly, as between an insurance agency and an underwriter, only the activities of an underwriter -- and not those of an agent, or an entire category of potential agents -- can affect the risk relationship between the insurer and the policyholder.

The state court's references in the quoted material to "insurance companies" and "reliab[ility]" signal that the state court was under this mistaken impression that the involvement by a specific type of insurance agency (in this case, a subsidiary of a national bank) in the creation of the insurer-policyholder relationship could affect the reliability of an insurer and, therefore, the relationship between the two parties to the insurance contract. This confusion had a disastrous effect on the outcome of the state court's analysis.

Clearly, the involvement of a particular type of insurance *agency* in creating a relationship between a policyholder and an insurer does not in any way affect that relationship, the central aspect of which is the viability of the *insurer*. One simply has nothing at all to do with the other. Moreover, "[e]xcluding a person from participation in an activity ... is different from regulating the *manner* in which the activity is conducted. The

former is the regulation of the person; the latter is the regulation of the activity." *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994) (emphasis added). The state court is simply without the authority to regulate a person when that person is a national bank or is its insurance subsidiary (as here) acting pursuant to authority granted by a federal statute.

In comparison, the Louisiana statutes do not attempt to regulate the substance of the risk-based relationship between an insurer and a policyholder[5] (or the performance under the contract defining that relationship); they improperly regulate only *how* that relationship comes about and who is allowed to create it.

The state court's reliance on *Fabe* is badly misplaced, since *Fabe*'s holding clearly and solely affects insurance underwriting, not agency, activities. It in no way can be read to suggest, as the state court apparently believed, that any and all activities of an insurance agency in helping create a relationship between an insurer and a

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[5] *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), sets forth the three factors the Court uses in determining what constitutes the "business of insurance" under the McCarran-Ferguson Act:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 129 (emphasis in original).

policyholder affect that relationship to such an extent so as to preempt specific federal statutes to the contrary.[6] The context of *Fabe* indicates, rather, that in determining the reach of McCarran-Ferguson, the central question involves whether the activity regulated under the state statute could impinge in any relevant way on the risk-based relationship between an insurer and a policyholder, not that between a policyholder and an agent, who is entirely excluded from the risk equation.

II. CONFLICTS WITH GOVERNING PRECEDENT

Even assuming Louisiana's statutes *regulate* the business of insurance under the McCarran-Ferguson Act, the state court ruling conflicts with governing precedent of this Court regarding the second test required under 15 U.S.C. Section 1012(b) -- namely, whether 12 U.S.C. Section 92 "*specifically relates to* the business of insurance" and, therefore, preempts a state statute that otherwise survives federal preemption under the first test of Section 1012(b).

The second test of Section 1012(b) says that a statute "*regulat[ing]* the business of insurance" still must

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[6] Moreover, *Fabe* noted that the Arizona statute at issue in *SEC v. National Sec.* was only "saved" from federal preemption by McCarran-Ferguson because it contained a provision that required the Arizona Director of Insurance, prior to approving a merger between two insurance companies, to "make sure that the proposed merger 'would not "substantially reduce the security of and service to be rendered to policyholders."'" *Fabe*, 113 S. Ct. at 2208 (citations omitted).

give way to contrary federal law, where the federal law "specifically *relates* to the business of insurance." 15 U.S.C. § 1012(b) (1988) (emphasis added).

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), provides useful guidance concerning the difference between a statute that *regulates* an activity as opposed to one that *relates* to the activity. "Relating to" means "having a connection with or reference to." *Id.* at 383. *Morales* noted that Congress' use of the term "relate" has a broader meaning than that of the term "regulate." *Id.* at 383-84. They are not interchangeable.

In *United States Dep't of Treasury v. Fabe*, this Court addressed the meaning of the term "specifically relates" through its "clear statement" rule: "[S]tate laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute *specifically requires* otherwise." *Fabe*, 113 S. Ct. at 2211. The legislative history of the McCarran-Ferguson Act, upon which the *Fabe* majority relied, confirms that Congress did not demand that the federal statute have more than a mere "relation" to insurance for the federal statute to trump the state insurance law, as long as that relationship is explicit. Concerning the first clause of Section 2(b) of the McCarran-Ferguson Act (Section 1012(b)), Senator Ferguson said:

> "What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to *interstate commerce*, or if there is a law now on the statute books relating in

> some way to interstate commerce, it would not apply to *insurance*. We wanted to be sure that the Congress, in its wisdom, would act specifically with reference to insurance in enacting the law." 91 CONG. REC. 1487 (1945). This passage later confirms that "no existing law and no future law should, *by mere implication*, be applied to the business of insurance...."

113 S. Ct. at 2211 n.7 (emphasis added) (citation omitted).

The state court, however, misinterpreted *Fabe*'s "clear statement" rule interpreting the McCarran-Ferguson Act; it believed that the Act required that the federal law "*regulate* the business of insurance." Petition at 25a. In doing so, the state court concluded that "[o]ther than the provision that national banks may act as insurance agents in small towns, there is *no other language* in Section 92 dealing with insurance or the regulation thereof."[7] Petition at 25a (emphasis added). This is a remarkable conclusion, remarkable in its blindness to a clear grant of power by Congress and to its significance under the McCarran-Ferguson Act. On the contrary, Congress clearly referred to insurance in enacting Section 92, and

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[7] Notably, the lower court found that in "[e]xamining the language of 12 U.S.C. § 92, we find that there is nothing in the language to indicate that it *regulates* the business of insurance." Petition at 25a (emphasis added). The court obviously confused the first test of section 1012(b) (requiring the state statute to *regulate* the business of insurance) with the second test (requiring only that the federal statute *specifically relate* to the business of insurance).

no state court can credibly deny it. (In fact, the word "insurance" appears five times in the statute.) Notably, Section 92 states in relevant part:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association ... may ... act as the agent for any fire, life, or other *insurance* company ... by soliciting and selling *insurance* ....

12 U.S.C. § 92 (1994).

Moreover, the state court overlooked another recent decision decisively reconfirming federal supremacy within the McCarran-Ferguson context, which would have assisted it in correctly interpreting whether or not Section 92 relates to the business of insurance. In *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993), the Court considered whether provisions in the Employee Retirement Income Security Act (ERISA) concerning generally applicable fiduciary standards likewise applied to an insurance company's oversight of certain annuity contracts in the face of conflicting state insurance law. *Id.* at 521. In addressing this issue, the Court first considered whether McCarran-Ferguson required ERISA to yield to a conflicting state law. *Id.* The Court held that it did not, finding that ERISA -- while clearly not an "insurance law" -- "'obviously and specifically *relates* to the business of insurance.'" *Id.* (emphasis added) (citation omitted). Furthermore, the Court found federal preemption notwithstanding that ERISA *itself* contains a provision

that saves certain state insurance laws from preemption. The Court concluded that it had no "basis for concluding that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but 'where [that] law stands as an *obstacle* to the accomplishment of the full purposes and objectives of congress,' federal preemption occurs." *Id.* at 525-26 (emphasis added) (citation omitted). Here, preemption of Section 92 by Louisiana's banking statutes would be an "obstacle" to Congress' objectives in enacting Section 92. *Fabe* preceded *John Hancock*, which confirmed earlier preemption analysis and is the Court's latest expression on the same controlling point and should now be followed.

Accordingly, the Court should grant certiorari to correct the erroneous decision by the state court interpreting this important federal question.

CONCLUSION

For all the reasons set forth herein and in the Petition for Writ of Certiorari, the American Bankers Association, *et al.*, as *amici curiae* and on behalf of their members, respectfully urge the Court to grant the Petition.

Respectfully submitted,

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